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Attorneys for Defendant
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LIVING ESSENTIALS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation,

Plaintiff,

v.

INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation,

Defendant.

Case No. 08-cv-1166 IEG (POR)

LIVING ESSENTIALS' REPLY TO ITS *EX PARTE* MOTION FOR DISCOVERY TO RESPOND TO MOTION FOR PRELIMINARY INJUNCTION

Courtroom.: 1, Fourth Floor
Judge: Lousia S. Porter

Date Filed: 07/01/08

I. REPLY BRIEF

Hansen Beverage Company's ("Hansen") opposition to Living Essentials' *Ex Parte* Application for Discovery camouflages what is nothing more than an attempt to prejudice Living Essentials. Hansen seeks to shut down Living Essentials and its 5 HOUR ENERGY® product without allowing any discovery or testing of the evidence presented by Hansen. In fact, Hansen even objected to Living Essentials' use of Hansen's own Q2 earnings call transcript in opposing Hansen's Motion for Preliminary Injunction. (Dkt. #17.)

Hansen Beverage claims this case is simple, but it is not. On page 2, Hansen Beverage boldly asserts:

> Then, paragraph 18 [of the Complaint] gets to the heart of its: "…the name '5 HOUR ENERGY®' is, in and of itself, false and misleading . . . "

But, Hansen uses ellipses to cover the true basis for its allegation. Paragraph 18 of the Complaint states that the trademark 5 HOUR ENERGY® is: "untruthful based on the drink's ingredients and generally accepted principals of biochemistry, pharmacology, and physiology." Now, Hansen Beverage seeks to shut down 5 HOUR ENERGY® – a product that has been on the market for four years – without any inquiry as to these allegedly "generally accepted principals."

To support these “principals,” Hanson introduced an “expert” declaration from Dr. Thomas Davis. Now, to avoid discovery, it asserts: "Dr. Davis' deposition is unnecessary." (p. 8.) Hansen does not withdraw this "unnecessary" declaration but seeks to preclude Living Essentials from cross-examining Dr. Davis. As the basis for his opinion that 5 HOUR ENERGY® is false, Dr. Davis states in paragraph 12:

> . . . there is no type of human energy that does not require consumption and burning of calories. The only energy-yielding nutrients are proteins, carbohydrates, alcohol, and fats.

This testimony, upon which Dr. Davis' testimony is based, is directly contradicted by Hansen's own advertising. Hansen advertises its "Diet Red Energy Drink" as providing energy "without all the calories." (8/27/08 Supp. Hamler Decl., Ex. A.) Hansen also states in its advertising that amino acids and B vitamins – the same ones as those in 5 HOUR ENERGY® – provide "an immediate energy boost." (*Id.*) Dr. Davis' "opinions" contrary to Hansen’s own advertising need to be tested.

Hansen Beverage also submitted the declaration of its CEO, Rodney Sacks, claiming that Hansen needs immediate relief and will be "irreparably harmed" if Living Essentials is allowed to continue selling its 5 HOUR ENERGY® product – the same product that Living Essentials has sold for four years. Again, Hansen does not want Mr. Sacks cross-examined.[1] Mr. Sacks testifies that: "I believe that Living Essentials' ads have adversely affected Hansen's sales." (¶ 35.) But, Hansen reported "record sales" in its 2nd Quarter financial results – contrary to the harm alleged. (8/27/08 Supp. Hamler Decl., Ex. B.) Again, Hansen does not want its evidence questioned and does not want Living Essentials to be able to properly prepare for a preliminary injunction hearing.

Finally, buried at the end of Hansen's opposition brief[2], Hansen consciously avoids identifying how long it has known about Living Essentials' 5 HOUR ENERGY® product. While Hansen admits that it knew of Living Essentials' 5 HOUR ENERGY® product in February 2008, **Hansen doesn't state when it first learned of the 5 HOUR ENERGY® product and why it delayed in moving for a preliminary injunction**. Certainly, discovery is needed to determine when Hansen knew of the 5 HOUR ENERGY® product. It is believed Hansen has known about the 5 HOUR ENERGY® product for years – the same product that they seek to exclude from the market.[3] As this Court is well-aware, "delay [in seeking injunctive relief] rebuts any contention of irreparable injury." *Whittier Colleges v. American Bar Ass'n*, 2007 WL 1624100, *9 (C.D. Cal. 2007) (8/27/08 Supp. Hamler Decl., Ex. C); *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 55

[1] Again, Hansen asserts that Rodney Sacks' testimony is "unnecessary to oppose Hansen's motion" but Hansen does not withdraw it.

[2] Hansen also references Rule 26, but that is nothing more than a red herring. Discovery can be accomplished quickly and expeditiously. Hansen, however, seeks to prejudice Living Essentials by prohibiting any inquiry into the voracity of the statements made in support of its preliminary injunction motion. Hansen's claim that it cannot provide discovery before a Rule 26 conference is disingenuous.

[3] The timing of Hansen's motion for preliminary injunction is suspect as it coincides with Hansen's release of a 3-ounce energy supplement to directly compete with 5 HOUR ENERGY®. (8/21/08 Hamler Decl., Ex. A, at p.4.) Hansen's anti-competitive actions do not end with this lawsuit. Hansen filed suit against Red line which states on their bottle "7 hour Energy Boost." 3:2008 CV 01545. Yet, Hansen has not sought a preliminary injunction in that case illustrating the lack of irreparable injury.

F.Supp.2d 1070, 1090 (C.D. Cal. 1999) (finding five month delay in seeking injunctive relief "demonstrates the lack of any irreparable harm").[4]

At this juncture, Living Essentials will be satisfied with the following discovery prior to the preliminary injunction hearing:

1. The deposition of Dr. Thomas Davis pursuant to Rule 30.

2. The deposition of Randy Sacks pursuant to Rule 30.

3. A Rule 30(b)(6) deposition of Hansen with a deponent prepared to testify with Hansen's knowledge of: (a) Hansen's first knowledge of Living Essentials; (b) Hansen's first knowledge of the 5 HOUR ENERGY® product; (c) Hansen's sales of its various energy drinks by month in 2007 and 2008; (d) Hansen's advertising regarding its Hansen's Diet Red Energy drink, Monster Lo-Carb energy drink, Energy Waters energy drinks and the effects thereof; (e) any internal analysis (scientific or marketing) regarding Hansen's energy drinks or Living Essentials' 5 HOUR ENERGY® product; and (f) Hansen's decision to enter the 2-3 ounce "energy shot" market and all reasons and considerations thereto.

4. Pursuant to Rule 34, the production of all documents regarding Living Essentials or the 5 HOUR ENERGY® product.

5. Pursuant to Rule 34, the production of all documents regarding Hansen's entry into the 2-3 ounce energy market, including, but not limited to, all marketing plans, forecasts or studies related to such products.

6. Pursuant to Rule 34, all documents regarding any internal scientific or marketing analysis concerning or discussing Hansen's energy drinks or Living Essentials 5 HOUR ENERGY® product.

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[4] Hansen makes unfounded assertions regarding the operation of Living Essentials' web sites and its action in the Eastern District of Michigan. Hansen fails to advise the Court that Living Essentials brought the Michigan action within weeks of the offending product's introduction. It is also worth note that Living Essentials' website was only recently temporarily unavailable due to a change in servers.

Lastly, Hansen mentioned the need for a Protective Order. Living Essentials is prepared to promptly negotiate a Protective Order, but in the interim, Living Essentials will accept all discovery on an "attorneys' eyes only" basis to facilitate prompt disclosure.

II. CONCLUSION

Living Essentials respectfully requests that the Court enter an order allowing it to take limited, expedited discovery concerning matters raised by Hansen's preliminary injunction motion and any defenses thereto.

Dated: August 27, 2008

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC

By *s/Nathan Hamler*
Nathan R. Hamler, Esq.

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CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On August 27, 2008, I filed a copy of the following document(s):

LIVING ESSENTIALS' REPLY TO ITS *EX PARTE* MOTION FOR DISCOVERY TO RESPOND TO MOTION FOR PRELIMINARY INJUNCTION

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Executed on August 27, 2008, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

s/Nathan Hamler
Nathan R. Hamler, Esq.

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INNOVATION VENTURES, LLC dba
LIVING ESSENTIALS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation, Defendant.	Case No. 08-cv-1166 IEG (POR) **SUPPLEMENTAL DECLARATION OF NATHAN R. HAMLER IN SUPPORT OF LIVING ESSENTIALS' REPLY TO ITS *EX PARTE* MOTION FOR DISCOVERY TO RESPOND TO MOTION FOR PRELIMINARY INJUNCTION** Courtroom.: 1, Fourth Floor Judge: Lousia S. Porter Date Filed: 07/01/08

I, NATHAN R. HAMLER, DECLARE AS FOLLOWS:

1. I am an attorney at law duly licensed to practice law in the State of California, and am an associate with the law firm of Mintz Levin Cohn Ferris Glovsky and Popeo, P.C, counsel for Defendant Innovation Ventures, LLC dba Living Essentials. I have personal knowledge of the facts set forth in this declaration and could and would competently testify as to the same.

2. Attached as Exhibit B to this declaration is a true and correct copy of a document downloaded from plaintiff Hansen Beverage Company's public web site in this action, at the url address, http://www.hansens.com/products/products.php?subcat=15&color=energy.

3. Attached as Exhibit C to this declaration is a true and correct copy of a press release downloaded from plaintiff Hansen Beverage Company's public web site, entitled "Hansen Natural Reports Record 2008 Second Quarter and Six Months Financial Results."

4. Attached as Exhibit D to this declaration is a true and correct copy of the United States District Court for the Central District of California's decision in *Whittier College v. American Bar Ass'n*, No. CV 07-1817 PA, 2007 WL 1624100 (May 7, 2007).

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration is executed this 27th day of August, 2008 at San Diego, California.

s/Nathan Hamler
Nathan R. Hamler

CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On August 27, 2008, I filed a copy of the following document(s):

SUPPLEMENTAL DECLARATION OF NATHAN R. HAMLER IN SUPPORT OF LIVING ESSENTIALS' REPLY TO ITS *EX PARTE* MOTION FOR DISCOVERY TO RESPOND TO MOTION FOR PRELIMINARY INJUNCTION

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Norman L. Smith, Esq. Edward J. McIntyre, Esq. Alison L. Pivonka, Esq. **SOLOMON WARD SEIDENWURM & SMITH** 401 B Street, Suite 1200 San Diego, CA 92101 (619) 231-0303	Attorneys for Plaintiff HANSEN BEVERAGE COMPANY nsmith@swsslaw.com emcintyre@swsslaw.com apivonka@swsslaw.com

Executed on August 27, 2008, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

s/Nathan Hamler
Nathan R. Hamler, Esq.

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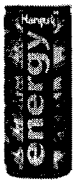
EXHIBIT A

Products

Energy Formula

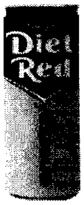
It is no wonder they call it the "Human Race." It seems we are running everywhere these days. Unfortunately, given this frantic pace, we sometimes run out of steam.

Hansen's Energy was conceived and specially formulated to provide a boost whenever you need it the most.



Original Formula

Hansen's energy provides an immediate energy boost whenever you need it the most! Lightly carbonated citrus flavor.



Diet Red Energy

Everyone needs a 'jumpstart' from time to time. Now you can get yours without all the calories!! Hansen's Diet Energy Supplement is specially formulated with the amino acid Taurine panax Ginseng L-Carnitine key B Vitamins Glucose and other specially selected ingredients to provide an immediate energy boost*

Hansen's Diet Energy is lightly carbonated with a great tasting berry flavor. 1 *These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose treat cure or prevent any disease.

Dazzling Crowds,
Quenching Thirsts

Hansen's
Natural Soda...
fruit never had
it so good.

Hansen's & Youth Sports

Home | Products | About Hansen's | News & Events | Store | Investor Relations | Contact | Team Hansen's | Terms and Conditions/Privacy Policy

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Designed & Developed by The Buddy Group, Inc.

EXHIBIT B

Hansen's

Hansen Natural Reports Record 2008 Second Quarter and Six Months Financial Results

Second Quarter Net Sales Rise 15.3 Percent to $282.2 Million; Net Income Increases 31.1 Percent to $50.2 Million

CORONA, Calif., Aug 7, 2008 (PrimeNewswire via COMTEX News Network) -- Hansen Natural Corporation (Nasdaq:HANS) today reported record sales and profits for the second quarter and six-months ended June 30, 2008.

Gross sales for the 2008 second quarter increased 15.5 percent to $324.1 million, from $280.6 million a year earlier. Net sales for the second quarter increased 15.3 percent to $282.2 million from $244.8 million a year ago.

Gross profit, as a percentage of net sales, for the 2008 second quarter was 51.8 percent compared with 52.4 percent in the comparable 2007 quarter and increased from 49.4 percent in the first quarter of 2008. The differences in gross profit as a percentage of net sales is primarily due to changes in product mix.

Operating expenses for the 2008 second quarter increased to $68.0 million from $66.8 million in the same quarter last year.

Distribution costs as a percentage of net sales were 5.5 percent for the quarter, compared with 5.4 percent in the same quarter last year.

Selling expenses as a percentage of net sales for the 2008 second quarter were 12.1 percent, compared with 10.6 percent a year ago. Increases in sponsorship expenditures, sampling activities and commissions, as well as costs relating to event and athlete sponsorships in the United Kingdom, contributed to the increase in such expenses over the prior year.

General and administrative expenses for the 2008 second quarter were $18.3 million compared with $27.6 million for the comparable quarter last year. Included in such expenses are costs associated with terminating existing distributors and legal and accounting fees relating to the special investigation of stock option grants, and granting practices and related litigation (see Certain Identified Items below). Stock based compensation (a non-cash item) was $3.7 million in the second quarter of 2008, compared with $2.0 million in the prior-year period.

Operating income for the 2008 second quarter increased 27.3 percent to $78.2 million from $61.4 million a year ago.

Net income for the second quarter of 2008 increased 31.1 percent to $50.2 million, or $0.51 per diluted share, compared with $38.3 million, or $0.39 per diluted share last year.

Net sales for the Company's DSD segment were $258.6 million for the three-months ended June 30, 2008, an increase of approximately $38.1 million, or 17.3 percent higher than net sales of $220.4 million for the three-months ended June 30, 2007. Net sales for the Company's warehouse segment were $23.7 million for the three-months ended June 30, 2008, a decrease of approximately $0.7 million, or 2.7 percent lower than net sales of $24.3 million for the three-months ended June 30, 2007.

Within the DSD segment, sales of Monster(r) and Java Monster(tm) drinks increased 22.3 percent during the 2008 second quarter while sales of Lost(r) Energy(tm), and other energy drinks were lower.

Sales to customers outside the United States were $19.5 million in the 2008 second quarter (including sales of approximately $1.9 million in the United Kingdom), compared with $13.4 million in the comparable quarter last year.

In the six-months ended June 30, 2008 gross sales increased 20.7 percent to $568.1 million from $470.7 million for the comparable period a year earlier. Net sales increased 20.4 percent to $494.4 million from $410.6 million for the comparable period a year earlier. Gross profit as a percentage of net sales was 50.8 percent for the first half of 2008 compared to 52.1 percent for the same period in 2007.

Operating expenses for the six-months ended June 30, 2008, increased to $129.9 million from $120.6 million in the same period last year (see Certain Identified Items below). Operating income increased 29.7 percent to $121.0 million from $93.3 million in the first six months of 2007.

Net income for the first half of 2008 increased 35.1 percent to $79.0 million, or $0.80 per diluted share, compared with $58.5

million, or $0.59 per diluted share, for the same period last year.

Rodney C. Sacks, chairman and chief executive officer, said that the record revenues and profits reflect continued strong sales of Monster Energy(r) and Java Monster(tm) drinks which continued to grow in excess of the category and gain market share.

"We are proud of the continued strong performance of the Monster(r) brand at a time when almost all categories of ready-to-drink beverages in the United States are experiencing weakness. This weakness is most pronounced in convenience store cold drink channels, where the vast majority of energy drinks are sold. We continue to believe that the moderating growth that we have seen in energy drinks appears, in part, to be due to the challenging macro economic environment and the resulting decline in store traffic primarily in the convenience and gas sector especially in Southern California," added Sacks.

In the first six months of 2008 the Company experienced increased costs of certain raw materials principally apple juice concentrate, aluminum cans and sugar which had a greater impact on the warehouse segment than on the DSD segment.

During the three-months ended June 30, 2008 the Company purchased 1.7 million shares of common stock at an average purchase price of $29.46 per share which the Company holds in treasury.

Certain Identified Items

Contributions net of reimbursements totaling ($0.4) million and $6.5 million for the three-months and ($0.4) million and $19.8 million for the six-months, ended June 30, 2008 and 2007, respectively, were recorded by the Company related to Anheuser-Busch distributors for their contributions to offset the costs of terminating prior distributors. Such amounts have been accounted for as deferred revenue, and are being recognized as revenue ratably over the anticipated 20-year life of the respective Anheuser-Busch distribution agreements. Revenue recognized was $0.5 million for the three-months and $1.0 million for the six-months ended June 30, 2008 and 2007, respectively.

In connection with the transition of certain of the Company's distribution arrangements, the Company incurred termination costs amounting to $0.1 million and $8.4 million in the three-months and $0.1 million and $14.7 million in the six-months, ended June 30, 2008 and 2007, respectively, to certain of its prior distributors, who have been replaced by Anheuser-Busch distributors. Such termination costs have been expensed in full and are included in operating expenses for the corresponding periods.

In connection with the Company's special investigation of stock option grants and granting practices, related litigation and other related matters, the Company incurred professional service fees, net of insurance proceeds, of ($0.4) million and $4.2 million for the three-months and ($0.2) million and $10.9 million for the six-months ended June 30, 2008, and 2007 respectively, which have been fully expensed in the respective periods.

The following table summarizes the identified items discussed above for the three and six-months ended June 30, 2008 and 2007:

	Three-Months Ended June 30,		Six-Months Ended June 30,	
	2008	2007	2008	2007
	(In Thousands)	(In Thousands)	(In Thousands)	(In Thousands)
Deferred Revenue:				
Contributions from, net of reimbursements to, Anheuser-Busch Distributors	$ (412)	$ 6,497	$ (365)	$ 19,847
Recognition of deferred revenue	$ 493	$ 509	$ 1,016	$ 936
Operating Expenses:				
Termination payments to prior distributors	$ 150	$ 8,353	$ 150	$ 14,700
Professional service fees (net of insurance proceeds) associated with the review of stock				

option grants and granting practices, related litigation and other related matters	$ (430)	$ 4,221	$ (200)	$ 10,905

Auction Rate Securities

At June 30, 2008 the Company held auction rate securities with a face value of $129.8 million ($207.5 million at March 31, 2008). Additional redemptions amounting to $8.9 million were received by the Company during July. The Company determined that a temporary impairment of $5.8 million had occurred at June 30, 2008 and recorded a charge of $3.4 million net of taxes as a component of accumulated other comprehensive loss for the six-months ended June 30, 2008. These securities will continue to accrue interest at their contractual rates until their respective auctions succeed or they are redeemed.

"Based on our ability to access cash and other short term investments and based on our expected operating cash flows, we do not anticipate that the current lack of liquidity of these investments will have a material effect on our liquidity or working capital," Sacks said.

The Company will host an investor conference call on August 7, 2008 at 2:00 p.m. Pacific Time (5:00 p.m. Eastern Time). The conference call will be open to all interested investors through a live audio web broadcast via the internet at www.hansens.com and www.opencompany.info. For those who are not able to listen to the live broadcast, the call will be archived for approximately one year on both websites.

Hansen Natural Corporation

Based in Corona, California, Hansen Natural Corporation markets and distributes Hansen's(r) Natural Sodas, sparkling beverages, fruit juice Smoothies, Energy drinks, Energade(r) energy sports drinks, multi-vitamin juice drinks in aseptic packaging, iced teas, apple juice and juice blends, Junior Juice(r) juices, Blue Sky(r) brand beverages, Monster Energy(r) brand energy drinks, Java Monster(tm) brand non-carbonated dairy based coffee drinks, Lost(r) Energy(tm) brand energy drinks, Joker Mad Energy(tm), Unbound(r) Energy and Ace(tm) Energy brand energy drinks, Rumba(tm), Samba and Tango brand energy juices. For more information visit www.hansens.com and www.monsterenergy.com.

Gross sales, although used internally by management as an indicator of operating performance, should not be considered as an alternative to net sales, which is determined in accordance with accounting principles generally accepted in the United States of America ("GAAP"), and should not be used alone as an indicator of operating performance in place of net sales. Additionally, gross sales may not be comparable to similarly titled measures used by other companies as gross sales has been defined by our internal reporting requirements. However, gross sales is used by management to monitor operating performance including sales performance of particular products, salesperson performance, product growth or declines and our overall performance. The use of gross sales allows evaluation of sales performance before the effect of any promotional items, which can mask certain performance issues. Management believes the presentation of gross sales allows a more comprehensive presentation of our operating performance. Gross sales may not be realized in the form of cash receipts as promotional payments and allowances may be deducted from payments received from customers.

Certain statements made in this announcement may constitute "forward-looking statements" within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended, regarding the expectations of management with respect to revenues and profitability. Management cautions that these statements are qualified by their terms or important factors, many of which are outside of the control of the Company, that could cause actual results and events to differ materially from the statements made herein, including, but not limited to, the following: changes in consumer preferences; changes in demand that are weather related, particularly in areas outside of California; competitive pricing and/or marketing pressures; activities and strategies of competitors; changes in the price and/or availability of raw materials for the Company's products; the availability of production and/or suitable facilities; the marketing efforts of the distributors of the Company's products, most of which distribute products that are competitive with the products of the Company; the introduction of new products, as well as unilateral decisions that may be made by grocery and/or convenience chain stores, specialty chain stores, club stores and other customers to discontinue carrying all or any of the Company's products that they are carrying at any time; and other risks detailed from time to time in the Company's reports filed with the Securities and Exchange Commission. The Company's actual results could differ materially from those contained in the forward-looking statements. The Company assumes no obligation to update any forward-looking statements.

HANSEN NATURAL CORPORATION AND SUBSIDIARIES
CONDENSED CONSOLIDATED STATEMENTS OF INCOME AND OTHER INFORMATION
FOR THE THREE- AND SIX-MONTHS ENDED JUNE 30, 2008 AND 2007

(In Thousands, Except Per Share Amounts) (Unaudited)

	Three-Months Ended June 30,		Six-Months Ended June 30,	
	2008	2007	2008	2007
Gross sales, net of discounts & returns*	$324,134	$280,582	$568,132	$470,651
Less: Promotional and other allowances**	41,890	35,819	73,710	60,036
Net sales	282,244	244,763	494,422	410,615
Cost of sales	136,031	116,510	243,489	196,726
Gross profit	146,213	128,253	250,933	213,889
Gross profit margin as a percentage of net sales	51.8%	52.4%	50.8%	52.1%
Operating expenses (1)	68,023	66,830	129,916	120,557
Operating expenses as a percentage of net sales	24.1%	27.3%	26.3%	29.4%
Operating income	78,190	61,423	121,017	93,332
Operating income as a percentage of net sales	27.7%	25.1%	24.5%	22.7%
Interest and other income, net	2,769	1,752	6,395	3,278
Income before provision for income taxes	80,959	63,175	127,412	96,610
Provision for income taxes	30,727	24,864	48,369	38,101
Net income	$ 50,232	$ 38,311	$ 79,043	$ 58,509
Net income as a percentage of net sales	17.8%	15.7%	16.0%	14.2%
Net income per common share:				
Basic	$0.54	$0.43	$0.85	$0.65
Diluted	$0.51	$0.39	$0.80	$0.59
Case sales (in thousands) (in 192-ounce case equivalents)	28,716	26,950	50,990	46,345
Average net sales price per case	$ 9.83	$ 9.08	$ 9.70	$ 8.86

(1) Includes costs associated with terminating existing distributors and legal and accounting fees relating to the special investigation

of stock option grants and granting practices and related litigation, net of insurance proceeds.

* Gross sales, although used internally by management as an indicator of operating performance, should not be considered as an alternative to net sales, which is determined in accordance with accounting principles generally accepted in the United States of America ("GAAP"), and should not be used alone as an indicator of operating performance in place of net sales. Additionally, gross sales may not be comparable to similarly titled measures used by other companies as gross sales has been defined by our internal reporting requirements. However, gross sales is used by management to monitor operating performance including sales performance of particular products, salesperson performance, product growth or declines and our overall performance. The use of gross sales allows evaluation of sales performance before the effect of any promotional items, which can mask certain performance issues. Management believes the presentation of gross sales allows a more comprehensive presentation of our operating performance. Gross sales may not be realized in the form of cash receipts as promotional payments and allowances may be deducted from payments received from customers.

** Although the expenditures described in this line item are determined in accordance with GAAP and meet GAAP requirements, the disclosure thereof does not conform with GAAP presentation requirements. Additionally, the presentation of promotional and other allowances may not be comparable to similar items presented by other companies. The presentation of promotional and other allowances facilitates an evaluation of the impact thereof on the determination of net sales and illustrates the spending levels incurred to secure such sales. Promotional and other allowances constitute a material portion of our marketing activities.

HANSEN NATURAL CORPORATION AND SUBSIDIARIES
CONDENSED CONSOLIDATED BALANCE SHEETS
AS OF JUNE 30, 2008 AND DECEMBER 31, 2007
(In Thousands, Except Share Amounts) (Unaudited)

	June 30, 2008	Dec. 31, 2007
ASSETS		
CURRENT ASSETS:		
Cash and cash equivalents	$182,953	$ 12,440
Short-term investments	22,066	63,125
Accounts receivable, net	83,404	81,497
Inventories	123,218	98,140
Prepaid expenses and other current assets	10,614	3,755
Deferred income taxes	11,902	11,192
Total current assets	434,157	270,149
INVESTMENTS	115,181	227,085
PROPERTY AND EQUIPMENT, net	9,238	8,567
DEFERRED INCOME TAXES	16,399	14,006
INTANGIBLES, net	24,723	24,066
OTHER ASSETS	774	730

	$600,472	$544,603
	========	========
LIABILITIES AND STOCKHOLDERS' EQUITY		
CURRENT LIABILITIES:		
Accounts payable	$ 71,272	$ 56,766
Accrued liabilities	11,791	9,019
Accrued distributor terminations	4,052	4,312
Accrued compensation	4,536	5,827
Current portion of capital leases	313	663
Income taxes payable	13,298	6,294
	--------	--------
Total current liabilities	105,262	82,881
DEFERRED REVENUE	38,174	39,555
COMMITMENTS AND CONTINGENCIES		
STOCKHOLDERS' EQUITY:		
Common stock - $0.005 par value; 120,000,000 shares authorized; 96,533,211 shares issued and 92,179,460 outstanding as of June 30, 2008; 95,848,711 shares issued and 93,191,191 outstanding as of December 31, 2007	483	479
Additional paid-in capital	105,919	96,749
Retained earnings	432,691	353,648
Accumulated other comprehensive loss	(3,429)	(47)
Common stock in treasury, at cost; 4,353,751 and 2,657,520 shares as of June 30, 2008 and December 31, 2007, respectively	(78,628)	(28,662)
	--------	--------
Total stockholders' equity	457,036	422,167
	--------	--------
	$600,472	$544,603
	========	========

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EXHIBIT C

C**Whittier College** v. American **Bar Ass'n**
C.D.Cal.,2007.
Only the Westlaw citation is currently available.
United States District Court,C.D. California.
WHITTIER COLLEGE
v.
AMERICAN **BAR ASS'N**
No. CV 07-1817 PA.

May 7, 2007.

Paul R. Kiesel, William L. Larson, Kiesel Boucher & Larson, Beverly Hills, CA, for Whittier College.
Anne E. Rea, Daniel M. Twetten, David T. Pritkin, Michael P. Doss, Robert Mark Stone, Sidley Austin, Los Angeles, CA, for American Bar Ass'n.

CIVIL MINUTES-GENERAL

ANDERSON, J.

C. Kevin Reddick	Bridget Montero	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Paul Kiesel	Patricia Larson
William Larson	Robert Stone
	Anne Rea

Proceedings: Application for Preliminary Injunction

*1 Before the Court is a Motion for Preliminary Injunction filed by plaintiffs Whittier College and Whittier Law School (collectively "Whittier") (Docket No. 5). Whittier seeks injunctive relief against defendants the American Bar Association ("ABA") and the ABA's Council of the Section of Legal Education and Admissions to the Bar (the "Council") preventing the ABA from revoking Whittier's status as an ABA-approved law school. Whittier also seeks mandatory injunctive relief requiring the ABA to revoke the ABA's August 2005 decision placing Whittier on probation and to delete all references to Whittier's probationary status from all ABA websites and publications. Finally, Whittier requests that the Court enjoin the ABA from placing Whittier on probation for a period of five years and to forbid the ABA from proceeding against Whittier except in compliance with the ABA's published standards, interpretations, and rules of procedure.

I. *Factual Background*

The Council is recognized by the United States Department of Education as the accrediting agency for law schools. An accredited law school qualifies for federal student loans and many states require graduation from an ABA-accredited law school to become a member of the bar. The Council's accreditation process, which the ABA calls "approval," is governed by the ABA's Rules of Procedure. In making its decisions, the Council is assisted by the Accreditation Committee (the "Committee"). The Committee and Council apply the ABA's published Standards for Approval of Law Schools (the "Standards") and Interpretations (the "Interpretations") which help clarify the Standards.

The Committee and Council monitor schools to ensure that they operate in compliance with the Standards. Among other methods, the ABA monitors schools through site visits. Following an inspection, the site team issues a report which is provided to the Committee and the school. The Committee considers the site visit report and any comments and evidence submitted by the school before making findings of fact and conclusions regarding the school's compliance with the Standards. These written findings of fact and conclusions are provided to the school. Representatives from the school may appear before the Committee and be represented by counsel. A school's appearance before the Committee is transcribed.

If the Committee concludes that it has reason to believe that a school is not in compliance with the Standards, the Committee will notify the school in writing of its concern and request additional information from the school. If, after reviewing additional information, the Committee determines that the school has not demonstrated compliance, the Committee may order the school to show cause why it should not be required to take appropriate remedial action or be sanctioned. Sanctions may include monetary penalties, censure, probation, and removal from the list of ABA-approved schools. When the Council considers a recommendation from the Committee to impose sanctions, the Council will consider the Committee's findings of fact and conclusions, the record before the Committee, and may permit the school to submit additional evidence. The school may appear before the Council and be represented by counsel. The school's appearance before the Council is transcribed. The Council then issues a written decision which is provided to the school.

***2** When it decides that probation is warranted, the Council sets a time limit for the school to come into compliance. This time period may not exceed two years unless the Committee or Council extends the probationary period for good cause. If the Committee decides at the end of a school's period of probation that the school has not established that it is in compliance, and there is no cause to extend probation, the Committee may recommend that the Council remove the school from the list of ABA-approved schools. If the Council agrees to remove the school from the approved list, the school may appeal the decision to the ABA's House of Delegates.[FN1] A school's removal from the approved list is stayed pending a decision by the House of Delegates. Any student who enrolls in an ABA-approved school prior to the decision to remove the school from the approved list becoming final is considered to have graduated from an ABA-approved school.

FN1. The control and administration of the ABA is vested in the House of Delegates, the policy-making body of the association.

Whittier became an ABA-approved law school in 1985. The school moved from Los Angeles to Costa Mesa in 1997. Soon after moving to Costa Mesa, the first time success rate of Whittier's graduates on the California bar examination plummeted. In 1999, the Committee and Council communicated their concerns about Whittier's first-time passage rate on the California bar examination to Whittier.[FN2] In many of these communications, the Committee expressed its concern that Whittier's "graduates are less successful on the California bar examination than graduates of other ABA-approved law schools in California." *See* Cogan Declaration, Exhibits 4, 9, 10 & 11. As a result of the unfavorable comparison between Whittier's bar passage rate and the pas age rate of the other ABA-approved law schools in California, the Committee concluded that Whittier had not established compliance with Standard 301(a), which states: "A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession." The Committee also found that Whittier had not established compliance with Interpretation 301-1, which provided: "Among the factors to be considered in assessing the extent to which a law school complies with [Standard 301] are the attrition rate of the school's students, and the bar passage and career placement rates of its graduates."[FN3]

FN2. The Committee had previously cited Whittier for its low bar first-time passage rate in 1992, 1993, 1994 and 1995. *See* Cogan Declaration, Ex. 14, p. 212-13.

FN3. Interpretation 301-1 was amended and renumbered in 2004. The revised Interpretation 301-3 states: "Among the factors to be considered in assessing the extent to wh ch a law school complies with this Standard are the rigor of its academic program, including its assessment of student performance, and the bar passage rates of its graduates." Unless otherwise noted, the Court will refer to Interpretation 301-3.

In responding to the Committee's concerns, Whittier frequently compared its first-time bar passage rate to the overall bar passage rate of students from California's ABA-approved law schools. *See* Cogan Declaration, Exhibits 7, 8, 18, 22, 23 & 24. Indeed, as both the ABA and Whittier acknowledge, both in their submissions to the Court and in more than six years of correspondence, with only one exception, Whittier's first-time bar passage rate has been persistently and substantially below the average for all California ABA-approved law schools since at least the February 1997 California bar examination:

Examination	All California ABA-approved	Whittier	Difference
February 1997	69.8	60.9	-8.9
July 1997	82.4	67.9	-14.5
February 1998	62.8	73.9	11.1
July 1998	72.1	45.9	-26.2
February 1999	55.8	55.6	-0.2
July 1999	69	43	-26
February 2000	50	26	-24
July 2000	74	54	-20
February 2001	50	28	-22
July 2001	79	50	-29
February 2002	52	38	-14
July 2002	72	42	-30
February 2003	57	25	-32
July 2003	72	31	-41
February 2004	49	24	-25
July 2004	69	41	-28
February 2005	58	33	-25
July 2005	70	40	-30
February 2006	60	38	-22
July 2006	74	59	-15

***3** In light of its poor performance on the bar examination in comparison to the other California ABA-approved law schools, and after determining that Whittier's initial efforts to improve its bar passage rate had not resulted in any noticeable improvement, the Committee, in June 2004, ordered Whittier to show cause why it should not be required to take appropriate remedial action, be placed on probation, or be removed from the list of ABA-approved law schools. *See* Cogan Declaration, Ex. 12. The Committee conducted a hearing on its order to show cause in April 2005. Accompanied by counsel, Whittier Law School's Dean and Whittier College's President appeared at the hearing. In its April 2005 Recommendation, the Committee noted that "beginning in 1996, a significant double-digit gap developed between the School's first-time passage rate and the passage rate for all other ABA-approved schools in California."*Id.*, Ex. 14, p. 214. The Committee concluded that Whittier "has not demonstrated that it is in compliance with Standard 301(a) and Interpretation 301-3 and that the Law School's noncompliance is substantial and has been persistent."*Id.* at p. 220.The Committee recommended that the Council place Whittier on probation for two years and require that Whittier demonstrate compliance with Standard 301 and Interpretation 301-3 before being removed from probation. *Id.* Whittier appealed the Committee's recommendation to the Council.

In August 2005, the Council considered the Committee's recommendation along with the arguments and evidence submitted in support of Whittier's appeal. Representatives from Whittier, including the Dean, President, Chairman of the Board of Trustees, and outside counsel appeared at the Council's meeting. In adopting the Committee's April 2005 findings of fact, the Council found that the Committee's findings were supported by substantial evidence. *Id.*, Ex. 15, p. 240. The Council concluded that Whittier "has not demonstrated that it is in compliance with Standard 301(a) and Interpretation 301-3 and that the Law School's noncompliance is substantial and has been persistent."*Id.* at p. 250.The Council placed Whittier on probation for two years. *Id.* at p. 251.The Council further determined that in order to be taken off probation prior to or at the end of the two year period, Whittier must demonstrate compliance with Standard 301(a) and Interpretation 301-3. *Id.* The Council also required Whittier to submit a plan for bringing the school into compliance with Standard 301(a) and Interpretation 301-3 by October 2005.

Since being placed on probation in August 2005, Whittier has submitted its remedial plan and adopted a "small school" model with reduced enrollment and higher admission standards. According to Whittier, its probationary status has made it more difficult to improve its bar passage results. Several of its faculty have left, students, including some of Whittier's most successful, have transferred to other schools, and the smaller class size has reduced the school's financial resources. Despite these challenges, Whittier's success rate on the July 2006 California bar exam improved by 19 points from the prior year from 40% to 59%. Even the 59% pass rate was, however, 15% below the average for all California ABA-approved schools.

***4** In light of the improvement, Whittier petitioned the Committee in December 2006 to remove the school from probation. Although noting the progress made by Whittier, the Committee declined to remove Whittier from probation prior to the expiration of the two-year probationary period in January 2007. In rejecting Whittier's request, the Committee issued a written decision which concluded that Whittier "has not yet demonstrated that it is in compliance with Standard 301(a) and Interpretation 301-[3]."*Id.,* Ex. 25, p. 798. Whittier appealed the Committee's denial of its request to the Council. In February 2007, the Council considered Whittier's appeal. Representatives from Whittier, including the Dean, President, and Chairman of the Board of Trustees appeared at the Council's meeting. *Id.* at Ex. 26. Following its review of the Committee's decision and the evidence submitted in support of Whittier's appeal, the Council concurred in the Committee's conclusion that Whittier was still not in compliance with Standard 301 and Interpretation 301-3. *Id.* As a result, Whittier remains on probation at least through August 2007.

On March 19, 2007, following the denial of its appeal, Whittier commenced this action. In its Complaint, Whittier alleges that the ABA has violated its rights to due process under Federal and California common law. Specifically, Whittier contends that in assessing its compliance with Standard 301(a) and Interpretation 301-3, the ABA has applied "unapproved and unpublished" criteria. In support of its allegations, Whittier asserts that Hulett Askew, the ABA's Consultant on Legal Education, has admitted that rather than relying on the flexible guidelines for bar passage contained in Standard 301 and Interpretation 301-3, the ABA actually applies a strict objective numerical requirement. In testimony before the United States Department of Education in December 2006, Mr. Askew stated:

If [the] bar passage is over 70 percent for the graduating students in the main State in which the school is located, there typically is no problem with that law school. However, if that law school is more than ten points below the ABA State average in that [State], for instance, if the State average for all ABA schools is 90 percent, and the law school is at 75 percent, we may request additional information from the school as to why you are falling below your sister law schools in your State.

So if it's above 70 percent and within ten points of the average, there's typically no problem. If it is between 70 and 60, I'll discuss that in a minute. If it's below 60 percent for the main jurisdiction in which the students take the exam, we will always request additional information from the law school in terms of what additional information it can provide us, the Accreditation Committee, at the first cut about bar passage in that State.

Patton Declaration, Ex. 4, p. 95-96. Whittier further contends that the ABA's March 2007 publication of a proposed amendment to the Standards, which would add Interpretation 301-6 provides additional evidence that the ABA has enforced a "secret" bar passage requirement. The proposed Interpretation 301-6 states:

***5** In considering bar passage rates when determining a school's compliance with Standards 301(a) and 501(b), the first-time bar passage rates of a school's graduates for the most recent three years in the three jurisdictions in which the largest number of the school's graduates take the bar examination are initially reviewed. If data demonstrate to the Accreditation Committee that the school's first-time bar passage rates frequently are seventy percent or below, the school shall be asked to provide additional information in order to demonstrate compliance with the Standards. Such additional information may include, without limitation, first-time bar passage rates for a number of years in other jurisdictions in which a substantial number of the school's graduates take the bar examination, second-time taker bar passage rates of the school's graduates for a number of years, and ultimate bar passage rates of the school's graduates for a number of years; and, for the previous three years, information on academic support, attrition rates, bar preparation programs, and the entering credentials of students.

Supplemental Cogan Declaration, Ex. 2, p. 7; *see alsoid.* at p. 5 ("The 'trigger of 70% or below is the benchmark that the Accreditation Committee has most frequently used in recent years.").

II. *Legal Standard for Issuance of a Preliminary Injunction*

Whittier filed its Motion for Preliminary Injunction one day after commencing this action. To obtain a preliminary injunction in the Ninth Circuit, a party must demonstrate: "(1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor."*Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League,* 634 F.2d 1197, 1201 (9th Cir.1980); *accordTextile Unlimited, Inc. v. A..BMH Co., Inc.,* 240 F.3d 781, 786 (9th Cir.2001)." 'These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." ' *MAI Systems Corp. v. Peak Computer, Inc.,* 991 F.2d 511, 516-17 (9th Cir.1993) (quoting *Diamontiney v. Borg,* 918 F.2d 793, 795 (9th Cir.1990)). " 'Where a party can show a strong chance of success on the merits, he need only show a possibility of irreparable harm. Where, on the other hand, a party can show only that serious questions are raised, he must show that the balance of hardships tips sharply in his favor." ' *Id.* at 1517 (quoting *Bernard v. Air Line Pilots Ass'n, Int'l,* 873 F.2d 213, 215 (9th Cir.1989)). Delay in requesting injunctive relief may rebut an allegation of irreparable harm. *SeeMiller v. Cal. Pac. Med. Ctr.,* 991 F.2d 536, 544 (9th Cir.1993) (" 'Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." ') (quoting *Oakland Tribune, Inc. v. Chronicle Publ'g Co.,* 762 F.2d 1374, 1377 (9th Cir.1985)).

***6** For purposes of injunctive relief, " 'serious questions' refers to questions which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo."' *Gilder v. PGA Tour, Inc.* 936 F.2d 417, 422 (9th Cir.1991) (quoting *Republic of the Philippines v. Marcos,* 862 F.?d 1355, 1362 (9th Cir.1988); *see alsoid.*("Serious questi ›ns need not promise a certainty of success, nor even present a probability of success, but must involve a 'fair chance of success on the merits." '). "Under any formulation of the test, the moving party must demonstrate a significant threat of irreparable injury." *Arcamuzi v. Continental Air Lines, Inc.,* 819 F.2d 935, 937 (9th Cir.1987) (citing *Oakland Tribune, Inc.,* 762 F.2d 1374 at 1376). Additionally, in cases " 'where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." ' *Harris v. Board of Supervisors,* 366 F.3d 754, 760 (9th Cir.2004) (quoting *Fund for Animals, Inc. v. Lujan,* 962 F.2d 1391, 1400 (9th Cir.1992)). "The public interest inquiry primarily addresses impact on non-parties rather than parties." *Sammartano v. First Judicial District Court,* 303 F.3d 959, 974 (9th Cir.2002).

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion."*Mazurek v. Armstrong,* 520 U.S. 968, 972, 117 S.Ct. 1865, 1867, 138 L.Ed.2d 162 (1997). However, a preliminary injunction "is not a preliminary adj ıdication on the ultimate merits."*Sierra On-Line, Inc. v. Phoenix Software, Inc.,* 739 F.2d 1415, 1423 (9th Cir.1984)."[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."*University of Texas v. Camenisch,* 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1981); *see alsoSierra On-Line,* 739 F.2d at 1423 (for preliminary relief, the court need only find a probability that necessary facts will be established, not that such facts actually exist).

In seeking mandatory injunctive relief in addition to a prohibitory injunction, Whittier acknowledges that some of the injunctive it seeks goes well beyond maintaining the status quo. *Stanley v. University of S. Cal.,* 13 F.3d 1313, 1320 (9th Cir.1994) ("A prohibitory injunction preserves the status quo. A mandatory injunction 'goes well beyond simply maintaining the status quo *pendente lite* and is particularly disfavored.' When a mandatory preliminary injunction is requested, the district court should deny such relief 'unless the facts and law clearly favor the moving party." ') (citations omitted) (quoting *Anderson v. United States,* 612 F.2d 1112, 1114 (9th Cir.1979)); *Martin v. International Olympic Comm.,* 740 F.2d 670, 675 (9th Cir.1984) ("In cases such as the one before us in which a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing a preliminary injunction."); Anderson, 612 F.2d at 1115 (" '[M]andatory injunctions, however, are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." ') (quoting *Clune v. Publishers' Assn.*, 214 F.Supp. 520 (S.D.N.Y.1963)).

III. *Analysis*

***7** Although Whittier has characterized its claims as arising under "common law due process," because the ABA is a private organization, it is more accurate to characterize the claims as arising under Whittier's rights to "fair procedure." *SeeThomas M. Cooley Law School v. ABA*, 459 F.3d 705, 711 (6th Cir.2006) ("Many courts, including this one, recognize that 'quasi-public' professional organizations and accrediting agencies such as the ABA have a common law duty to employ fair procedures when making decisions affecting their members. Courts developed the right to common law due process as a check on organizations that exercise significant authority in areas of public concern such as accreditation and professional licensing.") (citations omitted); *see alsoApplebaum v. Bd. of Directors of Barton Mem'l Hosp.*, 104 Cal.App.3d 648, 657, 163 Cal.Rptr. 831, 836 (1980) ("The distinction between fair procedure and due process rights appears to be one of origin and not of the extent of protection afforded an individual; the essence of both rights is fairness. Adequate notice of charges and a reasonable opportunity to respond are basic to both sets of rights.").

Whether a fair procedure claim is brought pursuant to federal or California law, the legal analysis a court performs is nearly identical. In assessing a federal fair procedure claim, courts review "only whether the decision of an accrediting agency such as the ABA is arbitrary and unreasonable or an abuse of discretion and whether the decision is based on substantial evidence."*Thomas M. Cooley Law School*, 459 F.3d at 712. Similarly, under California law, "an organization's decision to expel or exclude an individual may be arbitrary either because the reason underlying the rejection is irrational or because the organization has proceeded in an unfair manner.... [W]henever a private association is legally required to refrain from arbitrary action, the association's action must be both substantively rational and procedurally fair."*Pinsker v. Pac. Coast Soc'y of Orthodontists*, 12 Cal.3d 541, 550, 126 Cal.Rptr. 245, 251-52 (1974). Because of the similarities between fair procedure claims, the Court concludes that the result it reaches would be the same whether it is analyzed under federal or California law. As a result, the Court, at least at this stage, need not determine if Whittier's state law claim is preempted by federal law. *CompareKeams v. Tempe Technical Inst., Inc.*, 39 F.3d 222 (9th Cir.1994) (finding no preemption of state law wrongful accreditation claim brought by student against accrediting agency) *withThomas M. Cooley Law School*, 459 F.3d at 712 ("Federal courts have exclusive jurisdiction over any action brought by a school challenging an accreditation decision made by an organization approved by the Secretary (such as the ABA). This grant of exclusive federal jurisdiction necessarily implies that federal law should govern disputes relating to decisions made by those bodies. It would make little sense for state law to govern claims that could not be heard in any state court.") (citing 20 U.S.C. § 1099b(f)*andChicago School of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schools & Colls.*, 44 F.3d 447, 450 (7th Cir.1994) (declining to follow *Keams*)).

***8** The standard of review on a fair procedure claim is even more deferential than the review a court undertakes in an action brought pursuant to the Administrative Procedure Act:

Although accrediting agencies perform a quasi-governmental function, they are still private organizations. Courts have made the policy decision to ensure that these organizations act in the public interest and do not abuse their power, but judicial review is limited to protecting the public interest. Recognizing that "the standards of accreditation are not guides for the layman but for professionals in the field of education," great deference should be afforded the substantive rules of these bodies and courts should focus on whether an accrediting agency such as the ABA followed a fair procedure in reaching its conclusions. We are not free to conduct a *de novo* review or substitute our judgment for that of the ABA or its Council.

Thomas M. Cooley Law School, 459 F.3d at 713 (citing 5 U.S.C. § 706(2)(A) and quoting *Wilfred Acad. of Hair & Beauty Culture v. S. Ass'n of Colls. & Schools*, 957 F.2d 210, 214 (5th Cir.1992)); *see alsoid.*("[I]n analyzing whether the ABA abused its discretion or reached a decision that was arbitrary or unreasonable, we focus on whether the agency 'conform[ed] its actions to fundamental principles of fairness." ') (quoting *Med. Inst. of Minn. v. Nat'l Ass'n of Trade & Technical Schools,* 817 F.2d 1310, 1314 (9th Cir.1987)); *W. State Univ. Of S. Cal. v. American Bar Ass'n,* 301 F.Supp.2d 1129, 1135 (C.D.Cal.2004) ("The Court's review is very deferential, but review includes the inquiry whether the accrediting body followed its own rules.").

A. *Likelihood of Success on the Merits/Serious Questions*

Given the number of hearings and opportunities Whittier has had to present evidence to the Committee and Council, it cannot seriously argue that the ABA violated its procedural rules. Whittier had adequate notice of each hearing, was provided with written decisions, was represented by counsel, was allowed to appear at hearings, was permitted to supplement the record with additional evidence, and took appeals of the Committee's adverse rulings to the Council. Instead, Whittier contends that despite the flexible guideline codified in Standard 301(a) and Interpretation 301-3, it has actually been subject to a far stricter "secret" numerical bar passage requirement. Relying on the December 2006 testimony of Mr. Askew before the United States Department of Education and the recent promulgation of proposed Interpretation 301-6, Whittier claims that this "unpublished and unapproved" criteria for bar passage rates has denied it a fair procedure by giving it no notice of the actual standard against which the ABA was measuring it.

The Court concludes that Whittier has little likelihood of success on the merits of its claims. Nor has Whittier raised a serious question. There appears to be little that is new or different about either Mr. Askew's testimony or proposed Interpretation 301-6. Both are, as Mr. Askew and proposed Interpretation 301-6 make clear, merely a "trigger" for further review. That further review, as Whittier appears to have known all along, measures a law school's bar passage rate against the bar passage rates of other ABA-approved schools in the same jurisdiction. There is little evidence that the ABA's conclusions concerning Whittier's failure to establish compliance with Standard 301(a) and Interpretation 301-3 were arbitrary or without substantial evidentiary support. The ABA consistently and repeatedly expressed its concern that Whittier failed to establish compliance with Standard 301(a) and Interpretation 301-3 given the fact that its bar passage rate was persistently and substantially below the average for ABA-approved schools in California. The ABA was not alone in measuring Whittier's bar passage rate against the other ABA-approved schools in California. Indeed, that is precisely how Whittier measured itself when responding to the ABA's concerns. Put simply, and particularly in light of the "great deference" to which the decisions of the ABA are entitled, the Court finds that Whittier has failed to raise serious questions or to establish a likelihood of success on the merits of its claims.

B. *Irreparable Injury/Balance of Hardships*

***9** Though significant, the harm suffered by Whittier as a result of the ABA's decision to place the school on probation does not justify the issuance of preliminary injunctive relief. Importantly, after being placed on probation in August 2005, Whittier waited approximately eighteen months before filing this action and bringing its Motion for Preliminary Injunction. Such a delay rebuts any contention of irreparable injury. *See*Miller, 991 F.2d at 544;*Oakland Tribune, Inc.,* 762 F.2d at 1377;*see also*Richard Feiner & Co. v. Turner Entm't Co., 98 F.3d 33, 34 (2d Cir.1996) ("The presumption [of irreparable harm] may be rebutted, if the defendant is able to demonstrate that the plaintiff delayed in bringing an action requesting preliminary injunctive relief.") (holding eighteen-month delay in seeking injunctive relief rebutted presumption of irreparable harm); *High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.,* 49 F.3d 1551, 1557 (Fed.Cir.1995) ("Absent a good explanation, not offered or found here, 17 months is a substantial period of delay that militates against the issuance of a preliminary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief."); *Playboy Enters., Inc. v. Netscape Commc'ns Corp.,* 55 F.Supp.2d 1070, 1090 (C.D.Cal.1999) (finding five month delay in seeking injunctive relief "demonstrates the lack of any irreparable harm").

Whittier claims that it moved quickly in bringing this action and seeking injunctive relief once it became aware of the ABA's use of "unpublished and unapproved" criteria. As the Court explained earlier, there appears to be little that is new or different about either Mr. Askew's December 2006 testimony or proposed Interpretation 301-6. Whittier has known for years that the performance of its graduates on the bar examination was being measured against the bar passage rates of the other ABA-approved schools in California. Moreover, the harm Whittier claims to have suffered must have begun when it was placed on probation. This is true regardless of whether the school is correct when it alternatively alleges that the ABA either failed to give the school adequate notice of the standard against which it was being measured or was applying a "secret" standard. At a minimum, Whittier was put on notice of the way in which the ABA analyzed bar passage information in December 2005 when ABA sent a memorandum to its member schools explaining the use of bar passage data in the accreditation process. *See* ABA Exh. 4. The December 2005 Memorandum notified member schools that the Committee and Council "do not apply Standard 301(a) to require that a school's graduates have any specific minimum bar passage rate. Adopting such a rigid standard would be unrealistic in light of the wide variation in bar passage rates and minimum score requirements that exist across jurisdictions in the United States."*Id.,* p. 193.The December 2005 Memorandum further stated:

***10** In examining bar passage data, the Accreditation Committee and the Council initially do focus on first-time bar passage success of a school's graduates in the jurisdictions in which the largest number of the school's graduates sit for the bar....

If examination of those first-time bar passage data indicate concerns as to a school's compliance with Standard 301, however, the school is encouraged to gather and provide more extensive bar passage data, such as "ultimate" bar passage data for those of its graduates who take a bar examination more than once, and first-time and repeat-taker bar passage data for the school's graduates in any jurisdictions in which a substantial number of its graduates sit for a bar examination....

It also should be emphasized that, in considering bar passage data when determining compliance with Standard 301, the Accreditation Committee and the Council look at bar passage results over a number of administrations. One "bad" result in one administration of a bar examination is not likely to result in a school's being found out of compliance with Standard 301, and one "good" result is not likely to result in a school that is on report for non-compliance with Standard 301 being relieved of an obligation to continue to report on this issue.

Id. at p. 193-94.As a result of its delay of eighteen months prior to seeking injunctive relief, the Court concludes that Whittier cannot establish irreparable harm.

Nor does the balance of hardships tip sharply in Whittier's favor. Although being placed on probation has resulted in no small amount of difficulty for Whittier, the integrity of the ABA's accreditation process, and the interests of prospective students in being informed of the history of poor first-time bar passage rate of Whittier's graduates argues against the issuance of the injunctive relief Whittier seeks. The Court therefore concludes that neither the balance of hardships nor the public interest would be served by the issuance of injunctive relief.

IV. *Conclusion*

The Court applauds the efforts Whittier has made to promote diversity and address the challenge of increasing the level of minority participation in the legal profession. The Court also recognizes the improvement that Whittier's graduates achieved on the most recent California bar examination, as well as the efforts Whittier has made to improve the quality of its student body and educational programs since it was placed on probation by the ABA. Nevertheless, Whittier has not established its entitlement to the injunctive relief it seeks. Whittier's probationary period continues through at least August 2007. Whether Whittier should continue on probation beyond August 2007, or removed from the ABA's list of approved schools, is a decision which must be made, in the first instance, by the ABA. For all of the foregoing reasons, Whittier's Motion for Preliminary Injunction is denied.

The Court sets a Scheduling Conference for June 4, 2007, at 10:30 a.m. The parties' Federal Rule of Civil Procedure 26(f) Joint Report shall be filed by May 25, 2007.

***11** IT IS SO ORDERED.

C.D.Cal.,2007.
Whittier College v. American Bar Ass'n
Not Reported in F.Supp.2d, 2007 WL 1624100 (C.D.Cal.)

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